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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1249

AMERICAN STEVEDORES, INC.,

Petitioner,

—against—

OLAF PEDERSEN'S REDERI A/S,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND APPENDIX

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IN THE

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OCTOBER TERM, 1975

No. .....

AMERICAN STEVEDORES, INC.,

Petitioner,

—against—

OLAF PEDERSEN'S REDERI A/S,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, American Stevedores, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on December 9, 1975, affirming the issuance of summary judgment by the United States District Court for the Eastern District of New York granting the Respondent-Shipowner indemnity from the Petitioner-Stevedore in a longshoreman's negligence action contrary to a prior jury verdict.

Citations to Opinions Below

The decision granting a new trial by the late District Judge Rosling is not reported, but is printed in the Appendix hereto (28a).

The subsequent opinion of District Judge Neaher granting respondent summary judgment against Petitioner is reported at 387 F.Supp. 754, and is printed in the Appendix hereto (14a).

The United States Court of Appeals for the Second Circuit filed an opinion which as of this writing is not reported. It is, however, printed in the Appendix hereto (3a).

Jurisdiction

The judgment of the Court of Appeals was entered on December 9, 1975 (1a).

This petition for the issuance of a writ of certiorari is being filed within ninety (90) days after the entry of said judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The basis of jurisdiction in the Court of first instance was diversity of citizenship, 28 U.S.C. 1332.

Constitutional Provision Involved

United States Constitution, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

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The Questions Presented

1. Was the Petitioner denied its constitutional right to trial by jury when the Court substituted its judgment for that of the jury on whether the Respondent's negligence constituted conduct sufficient to preclude indemnity? See *International Terminal Operating Co. Inc.* v. *N.V. Nederl A.S.M.*, 393 U.S. 74, 89 S.Ct. 53 (1968).

2. Is the maritime rule of imposing damages in proportion to fault violated when a vicariously liable stevedore is required to make full indemnity to a partly at fault shipowner? See *United States* v. *Reliable Transfer Co. Inc.*, 421 U.S. 397, 95 S.Ct. 1708 (1975).

3. Is a warranty of workmanlike service to be invoked from a shoreside contractor to the favor of a shipowner whose liability is based upon his own fault?

4. Does a longshoreman's contributory negligence constitute a breach, or merely some evidence of a breach, of his employer's warranty of workmanlike service?

5. Does the use of different standards to judge similar issues constitute an impermissible departure from the concept of a rule of law of equal application? See *Truax* v. *Corrigan*, 257 U.S. 312, 42 S.Ct. 124 (1921).

Statement of the Case

This lawsuit stems from an accident to a longshoreman named Joseph Rodriguez, who was injured while working aboard the M/V Sunny Prince on July 3, 1967. The petitioner, American Stevedores, Inc. (referred to as "Stevedore"), was the employer of Rodriguez; and respondent,

Olaf Pedersen's Rederi A/S (hereafter "Shipowner"), was the owner of the ship.

Rodriguez was injured in the afternoon of July 3, 1967 when he fell through an open hatch square in the darkened 'tween deck of the #2 hatch of the said vessel. The longshoremen, including Rodriguez, had worked in that hatch earlier in the day but had finished that work and moved on to other tasks in another hatch. Rodriguez's purpose in returning to the #2 hatch was to recover his gloves and hook that had been left there.

Unknown to Rodriguez or any of the other longshoremen, the conditions in the #2 hatch were changed drastically after they left. For, ship cleaners (working in the #2 hatch after the longshoremen had finished there) had removed the covers from the #2 'tween deck hatch square and, upon the express direction of the vessel's Chief Officer, did not replace those covers when their work was concluded. The cleaners, also at the direction of the vessel's Chief Officer, covered the corresponding opening in the weather deck, so that the #2 'tween deck hatch was now dark with an open hatch square. When the longshoremen had left that area it had been illuminated by the sun and the 'tween deck hatch square was fully covered with hatch boards.

There was an open passageway door leading from the #4 hatch where Rodriguez was working back to the now darkened and open #2 'tween deck square. Rodriguez went thru that door and passageway; and when he arrived on the 'tween deck of the now darkened #2 hatch, he tripped and fell through the uncovered opening into the lower hold.

Rodriguez sued the Shipowner for both negligence and unseaworthiness and claimed that by converting a covered and illuminated hatch square to one that was open and

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darkened, without giving notice to the men working aboard the vessel, the Shipowner was negligent, and that the changed conditions were dangerous and rendered the vessel unseaworthy. The jury found against the Shipowner for both negligence and unseaworthiness. The Shipowner never appealed from that verdict and the judgment entered thereon. The jury found Rodriguez damaged to the extent of $80,000, but reduced his recovery to $35,000 because of his contributory negligence.

The same jury then heard summations and charge on the Shipowner's claim for indemnity against the Stevedore. In connection with that claim, the jury was charged that the finding of contributory negligence on the part of Rodriguez established a breach of the Stevedore's warranty of workmanlike service (hereafter WWLS) which entitled the Shipowner to indemnity unless its own conduct was sufficient to preclude recovery. In the light of that anticipated charge, the summations focused on the issue of "conduct precluding indemnity". The jury verdict in favor of the Stevedore obviously was a finding that the conduct forming the Shipowner's negligence was sufficient to preclude indemnity.

The Shipowner thereafter made a post-trial motion for a judgment of indemnity against the Stevedore notwithstanding the verdict upon the ground that the plaintiff's contributory negligence entitled it to such as a matter of law. Alternatively, it asked for a new trial. Believing that a *prima facie* case of indemnity precluding conduct had been established by the Shipowner's negligence, Judge Rosling denied the motion for judgment as a matter of law. However, he did grant the Shipowner a new trial on the indemnity issue so that it might have a further opportunity to put in additional proof on the question of the open door (31a).

Following Judge Rosling's demise, the case was reassigned to Judge Neaher. Nothwithstanding the fact that its motion for judgment against the Stevedore had already been denied by Judge Rosling, Shipowner moved again for that relief before Judge Neaher. And, even though Judge Rosling had granted the Shipowner a new trial so that it might have another opportunity to offer further evidence on the indemnity issue, Shipowner's attorney stated in his moving affidavit to Judge Neaher that he had no further proof to offer. Since Shipowner admitted that it had no additional evidence to present upon a new trial, the Stevedore then brought on a cross motion to recall the order for a new trial and for the entry of judgment in favor of the Stevedore in accordance with the jury verdict upon the ground that the Shipowner rendered academic Judge Rosling's *desideratum* for a new trial and waived its right to the same. In other words, if the Shipowner had no further proof to offer on the indemnity issues, there is no purpose served by a new trial and the verdict already rendered on the evidence presented should be enforced by a judgment.

Judge Neaher granted the Shipowner's motion for judgment against the Stevedore and denied the Stevedore's cross motion and judgment was entered accordingly

Thus, although a full jury trial on the merits resulted in a verdict in its favor, the Petitioner-Stevedore herein has been denied the fruits of that victory by inconsistent judicial intervention. The initial Trial Judge (Rosling, *D.J.*), consistently denied the Respondent-Shipowner's argument that it was entitled to indemnity as a matter of law, but awarded it a new trial so that it might have an opportunity to put in further proof. Respondent-Shipowner admitted it had no further proof to offer, but then obtained judgment against the Petitioner-Stevedore from Judge Neaher

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on the identical arguments that had earlier been rejected by Judge Rosling.

That result was affirmed by the Court of Appeals in a decision which we submit is contrary to decisions of this Court, in conflict with decisions of other Circuit Courts, in conflict with its own prior decisions, and in fundamental disregard of petitioner's constitutional right to trial by jury and to be judged by standards no different than those used to judge others in similar positions.

The same unanimous jury that found the Shipowner negligent also found that its conduct precluded recovery of indemnity. It was an improper usurpation of the jury function for the Court to thereafter redetermine that issue and award judgment contrary to the jury verdict.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Act Herein Not Only to Halt Judicial Encroachment Upon the Constitutionally Guaranteed Right of Trial by Jury, But Also to Preserve the Integrity of Its Decisions.

The action of the judiciary herein in reversing the unanimous verdict of impartial jurors was not only contrary to the Seventh Amendment of the Constitution of the United States but was also in direct contravention of the controlling principles of law established by this Court in its guideline decisions in this field of law. There can be no doubt but that the issues of (1) whether a stevedore has breached its implied warranty of workmanlike service, and (2) whether a shipowner's conduct is such as to in any event preclude indemnity, *are issues of fact*. For this Court has so specifically declared in *Weyer-*

haeuser S.S. Co. v. *Nacirema Operating Co.*, 355 U.S. 563, 567, 78 S.Ct. 438, 441. A jury verdict on such a fact issue is expressly protected by the Seventh Amendment to the Constitution of the United States, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law*" (Emphasis added).

The primary purpose of such amendment is the preservation of the "common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent, issues of law are resolved by the Court and issues of fact are resolved by the jury under appropriate instructions of the Court", *Baltimore and C. Line* v. *Redman*, 295 U.S. 654, 657 (1935); *Walker* v. *New Mexico & S. P. R. Co.*, 165 U.S. 593, 596 (1897); and *Dimick* v. *Scheidt*, 293 U.S. 474, 476, 485-86 (1935).

A necessary corollary to the Seventh Amendment is that not even an appellate court may substitute its judgment for that of the jury, *Dennis* v. *Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208. Where the evidence is susceptible of different conclusions by reasonable men, the issue must be resolved by the jury, *Scheimann* v. *Grace Line Inc.*, 267 F.2d 596. The function of an Appellate Court vis-a-vis a jury verdict has been well articulated by this Court in *Lavender* v. *Kurn*, 327 U.S. 645 and more recently in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 110, wherein the following was quoted with approval from *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412:

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> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

It was obviously for the jury to determine whether the Shipowner's conduct in keeping the hatch square uncovered while at the same time darkening the hatch, and in leaving the passageway door open as an invitation to use, all without notice or warning, was under the totality of circumstances conduct sufficient to preclude indemnity. It was not for a subsequent judge or the Court of Appeals to substitute their contrary judgment.

Indeed, in substituting its own contrary judgment, the Court of Appeals has tacitly refused to follow the directive of *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 358, 82 S.Ct. 780, 783 (1962), wherein this Court reversed the Court of Appeals and entered judgment in accordance with the jury's verdict, and stated:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law' ".

This Court further stated (p. 364 at 369 U.S. and p. 786 at 82 S.Ct.):

> ". . . Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. *For a search for one*

possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. Arnold v. Panhandle & S. F. R. Co., 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889. Cf. Dick v. New York Life Ins. Co., 359 U.S. 437, 446, 79 S.Ct. 921, 927, 3 L.Ed.2d 935." (Italics added)

This proscription against judicial interference with and usurpation of the jury function was reiterated in *International Terminal Operating Co. Inc.* v. *N.V. Nederl A.S.M.*, 393 U.S. 74, 89 S.Ct. 53 (1968) where this Court *summarily* reversed the Court of Appeals for the Second Circuit and reinstated a jury verdict in favor of the stevedore against the shipowner, and said with regard to a claim for maritime indemnity:

"Under the Seventh Amendment that issue should have been left to the jury's determination".

The power of the federal judiciary is awesome, but is constitutionally limited. Tempting as it may be for judges to want to decide fact issues, such a temptation constitutes an abuse of power where the issue has already been resolved by a jury. Unless this Court acts, this Petitioner is without means to obtain enforcement of its constitutional right to trial by jury, and is without means to compel the lower federal judges to comply with the express directives of this Court. Others similarly situated in both this and other fields need such intervention by this Court to halt encroachment upon and erosion of the right to trial by jury.

II.

This Court Should Act Herein in Order to Restore the Rule of Law by Resolving Many Inter and Intra Circuit Conflicts on the Various Issues Present in This Case.

In the field of maritime personal injury there is such fundamental conflict between various Circuits and between different panels in the same Circuit that the concept of a "rule of law" seems to have vanished. Similarly situated parties receive altogether different justice merely because different jurists are applying different standards. The results are unfair, unpredictible and in violation of each person's fundamental right to equal application of the law. Consider the following:

A. *Where a Shipowner Is Liable for Its Own Fault, Is It Entitled to Receive an Implied Warranty of Workmanlike Service?*

Virtually every court that has considered the issue has held that the implied warranty of workmanlike service (WWLS) is judicially invoked as an equitable measure only to compensate an innocent shipowner who is liable for unseaworthiness (a species of liability without fault) occasioned or brought into play by some improper act of a stevedore or other shoreside contractor. Thus, in the Ninth, Fifth and Sixth Circuits, a WWLS is not invoked to benefit a shipowner whose liability, as here, is based upon its own fault. See *Davis* v. *Chas. Kurz & Co. Inc.*, 483 F.2d 184, 187 (9 Cir. 1973); *Centraal Stikstof Verkoopkanter M.V.* v. *Walsh Stevedoring Co.*, 380 F.2d 523, 529 (5 Cir. 1967); *Loffland Bros. Company* v. *Roberts*, 386 F.2d 540, 548-549 (5 Cir. 1967); *Hobart* v. *Sohio Petroleum Company*, 445 F.2d 435 (5 Cir. 1971); *Sandoval* v. *Mitsui*, 460

F.2d 1163, 1168 (5 Cir. 1972); *Whisenant* v. *Brewster & Bartle Offshore Company*, 446 F.2d 394, 403 ft. 31 (5 Cir. 1971); and *Liberty Mutual Insurance Company* v. *Fruehauf Corporation*, 472 F.2d 69, 71 (6 Cir. 1972). As these cases indicate, the WWLS was intended to "mitigate the harshness of the seaworthiness doctrine where the stevedoring firm was to blame for the injury to its employee". It was never intended to benefit a shipowner liable, as the respondent was here, for its own negligence or fault.

Although some of the panels of the Second Circuit have agreed that the WWLS is to be invoked only to benefit an otherwise innocent shipowner liable solely for the warranty of seaworthiness, other panels in the Second Circuit have disagreed and have invoked the WWLS regardless of whether the shipowner has been innocent or at fault. Compare *Schwartz* v. *Compagnie General Transatlantique*, 405 F.2d 270, 276 (2 Cir. 1968) and *Fairmont Shipping Corp.* v. *Chevron International Oil Company, Inc.*, 511 F.2d 1252, 1258 (2 Cir. 1975) with *Henry* v. *A/S Ocean*, 512 F.2d 401 (2 Cir. 1975).

This conflict is critical to the case at bar since we are not dealing here with an innocent shipowner, but rather one that was found to be negligent and at fault. The Courts in the Fifth, Sixth and Ninth Circuits would not have invoked any implied warranty of workmanlike service from the Petitioner and the indemnity claim would have been dismissed without any question being reached as to whether the WWLS was breached and whether the Shipowner's conduct precluded indemnity. However, the Court below invoked such warranty, notwithstanding the fact that the Shipowner was negligent, and found that it was breached by plaintiff's contributory negligence and that the jury verdict of Shipowner's indemnity precluding conduct could be legally ignored.

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There is no reason why the rights and obligations of shipowners and shoreside contractors *inter se* should vary so drastically depending upon the jurisdiction in which the litigation is commenced or the makeup of a particular panel.

B. *Does Contributory Negligence of an Employee Constitute a Breach of the Warranty of Workmanlike Service as a Matter of Law, or Is It Merely Some Evidence of the Same?*

The opinion of the Court below expressly recognizes that there is a conflict between the circuits on this issue (6a). The First, Second, Fourth and Ninth Circuits hold that the WWLS is breached as a matter of law by a finding of contributory negligence; and the Third and Fifth Circuits hold that such a finding is merely some evidence of a breach of WWLS. Thus, in the Fifth Circuit decision in *Julian* v. *Mitsui,* 479 F.2d 432, cert. den. 414 U.S. 1093, indemnity was denied notwithstanding that a finding of 95% contributory negligence; whereas in the Second Circuit in *Hartnett* v. *Reiss S.S. Co.,* 421 F.2d 101, cert. den. 400 U.S. 852, indemnity was mandated by reason of 1% contributory negligence.

But even the Second Circuit rule is not uniform in its application for only recently, in *Nye* v. *A/S D/S Svendborg,* 501 F.2d 376 (1974), cert. den. 420 U.S. 964, a finding of 50% contributory negligence was held not to constitute a breach of the WWLS and the shipowner's claim for indemnity was dismissed. Why should such difference in treatment exist within the same circuit?

It is to be further noted that the New York Court of Appeals seems to have lined up with the Third and Fifth Circuits in *Anzalone* v. *Moore-McCormack Line, Inc.,* 36 N.Y.2d 684 (1975) by affirming a decision of the Appellate Division, First Department, 43 A.D.2d 818, which in turn

affirmed a trial court's judgment dismissing a shipowner's indemnity claim for breach of WWLS based upon a plaintiff-employee's contributory negligence.

Manifestly this conflict in law is also of importance in the instant case since the Court below held that as a matter of law Rodriguez's contributory negligence constituted a breach of the WWLS, and it was that initial holding that then made the question of preclusive conduct so important. Again, why should resolution of this issue depend upon the jurisdiction in which the action is brought or the makeup of the panel that hears the case. We are dealing with matters of federal maritime law which should be uniform and of equal application throughout the country. In view of the existing conflict, we submit it is the duty of this Court to speak out and resolve the conflicts and promote such a uniform rule of law.

C. *By What Yardstick Is a Shipowner's Conduct to Be Measured to See If It Precludes Indemnity.*

The jury that found the Shipowner negligent (which finding was never appealed) also found that such conduct precluded indemnity. That conduct consisted of transforming a covered and illuminated 'tween deck hatch square into an open and darkened trap without notice or warning to those likely to use the same, and to permit the use of a passageway to such trap. Yet, by some extraordinary use of judicial power, the Court below held that as a matter of law such negligent conduct of the Shipowner did not warrant jury consideration.

Consider how Judge Augustus Hand viewed almost identical conduct by a shipowner in *Badalamenti* v. *United States*, 160 F.2d 422, 425 (2d Cir. 1947):

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"After he had proceeded 15 or 20 feet, and beyond a point where the light coming from open hatch No. 2 had penetrated, he was of course aware that he was in an area of darkness; nevertheless, *he had no reason to suppose that hatch No. 1 was open and that he ran any risk, other than the general one of stumbling against something in the dark*, for hatch No. 1 was closed on the deck above. We cannot say that he was likely to encounter any danger in attempting slowly to traverse this passage if, as he supposed, the hatch was not open. *Had it not been open he would not have plunged into the open hatch and met the fate which caused his injuries. Under the circumstances the trial judge was right in holding that Badalamenti's fall and injuries arose solely from the negligence of the respondent in not warning the stevedores that there was an open hatch within about 50 feet of where they were to work. We think it was foreseeable that they might have occasion to go to parts of the deck that were not lighted in pursuit of their calling. If they did, the open hatch was a great danger for it was not protected by any guardrail or ropes, or by any coaming sufficient to prevent an accident.* It is not reasonable to suppose that stevedores would not be likely to go about the deck where they were working and not to foresee danger to them from an open hatch which was only about 50 feet away. As a distinguished court said in Pioneer S.S. Co. v. McCann, 6 Cir., 170 F. 873, 868: *'It is hardly to be expected that men entering or working within a ship's hold will always keep within the exact parts of the hold where their employment, strictly construed, would call them.'*

"The opinion of Judge Woods in The Omsk, 4 Cir., 266 F. 200, supports the view that some warning or protection against an open hatch was required in cir-

> cumstances like those here, where the open hatch was in the control of the shipowner. See also West India & P.S.S. Co. v. Weibel, 5 Cir., 113 F. 169." (italics added)

Although the Second Circuit held in *Badalamenti, supra,* that neither of the two plaintiffs there were guilty of contributory negligence in walking about the darkened hatch since the only risk they ran was of stumbling against something in the dark and not falling through an open hatch, the Shipowner in the instant case has received more beneficial treatment by the reduction of the judgment against it for the contributory negligence of Rodriguez who in no respect acted differently then either of the plaintiffs in *Badalamenti.* And it is now given indemnity for its own fault contrary to a jury verdict.

How can it be said that in creating this foreseeably dangerous situation and without giving any warning or notice of the same to the longshoremen and, indeed, in leaving open and ajar a passageway door so as to implicitly invite its use as access to the #2 hatch, this Shipowner's conduct did not constitute a prima facie case for preclusion of indemnity? Indeed, in other recent instances different panels of the Second Circuit found even less egregious conduct by a Shipowner sufficient to preclude indemnity.

In *Conceicao* v. *New Jersey Export Marine Carpenters Inc.,* 508 F. 2d 437 (3 Cir. 1974), the shipowners failure to give the longshoreman proper information about the quantity of the stow and the place of stowage was held sufficient to preclude indemnity, notwithstanding the stevedore's breach of WWLS in overloading and breaking a pipe crib.

In *Hurdich* v. *Eastmount Shipping Corp.,* 503 F. 2d 397 (2 Cir. 1974), the Second Circuit again considered indem-

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nity precluding conduct. It held that the shipowners actual knowledge of the conditions and its failure to rectify the same was sufficient to constitute preclusive conduct. How then does the case at bar vary, and why should this petitioner be deprived of the jury verdict in its favor?

Conduct precluding indemnity in other Circuits has been held to include allowing a 'tween deck reefer door to swing into the hatchway where it was pulled off its hinges, *Blow* v. *Compagnie Maritime Belge,* 395 F. 2d 74 (4 Cir. 1968); the furnishing of defective hatch beams, *Waterman Steamship Corporation* v. *David,* 353 F. 2d 660 (5 Cir. 1965); the furnishing of defective ladder support brackets, *Delaneuville* v. *Simonsen,* 437 F. 2d 597, 602 (5 Cir. 1971); furnishing defective ladders, *Maples Case,* 1966 A.M.C. 2032, *aff'd sub. nom. D/S A/S Sverre* v. *Textports Stevedore Co. Inc.,* 387 F. 2d 648 (5 Cir. 1968); and furnishing defective hot water heaters, *Garner* v. *Cities Service Tankers Corporation,* 456 F. 2d 476 (5 Cir. 1972). Certainly it cannot be said as a matter of law that the conduct of the shipowners in those cases was any more egregious than the conduct of the Shipowner in the case at bar. There is no doubt but that in other circuits, and before other panels in the Second Circuit, the conduct of the Shipowner in the case at bar would have been considered sufficient to raise a fact question for resolution by the jury on the issue of conduct precluding indemnity. This type of juridical conflict which borders on the metaphysical should not be permitted to deprive a litigant of a favorable jury determination of a fact issue.

D. *What Standard Is to Be Utilized in Determining Where the Ultimate Liability for Shipboard Accidents Should Be Placed?*

In *DeGioia* v. *United States Lines Company*, 304 F. 2d 421, 426 (2 Cir. 1962), a well reasoned decision by Judge Clark held that the function of the doctrine of indemnification was to allocate the loss for a shipboard accident on the "institution or institutions most able to minimize the particular risk involved." The concept that liability "should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury" was thereafter adopted by this Court in *Italia Societa* v. *Oregon Stevedoring Company*, 376 U.S. 315, 324, 84 S. Ct. 748, 754 (1964).

Indeed, the Second Circuit itself has utilized that same standard in evaluating indemnity precluding conduct in recent decisions such as *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.*, 508 F. 2d 437 (2 Cir. 1974), cert. den. 421 U.S. 949 (1975), and *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397 (2 Cir. 1974). That same concept was again utilized by the Second Circuit in *Nye* v. *A/S D/S Svendborg*, 501 F. 2d 376 (2 Cir. 1974) in exonerating the plaintiff's employer from indemnity nothwithstanding that the plaintiff was 50% contributorily negligent.

It is obvious that the use of such a standard in considering the indemnity precluding conduct of the Shipowner in the case at Bar would support the jury verdict since the conditions that caused the accident were caused by and under the control of the Shipowner and could only have been rectified by the Shipowner.

However, rather than utilize the standard which it itself had created and which had been expressly approved by this Court and thereafter used by the Second Circuit in other

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cases, the Court below shifted to a "prevent or hinder" test for which it found support in other conflicting decisions in the Second Circuit. It then held *as a matter of law* that the darkened hatch was not a hindrance to Rodriguez in his efforts to locate his hook and glove!

This obvious straining against a jury verdict by the utilization of a different legal standard is a subtle way of circumventing the right to trial by jury and it destroys the concept of a rule of law of equal application, see *Truax* v. *Corrigan,* 257 U.S. 312, 42 S. Ct. 124 (1921).

Of course, it should be obvious that even if the "prevent or hinder" test be the proper one, then it certainly cannot be said as a matter of law that Mr. Rodriguez' efforts to locate his hook and glove were not hindered or impeded by the darkening of a previously illuminated hatch and by the opening of a hatch square which had previously been closed. Even under that standard, the verdict is supportable.

III.

This Court Should Decide Whether Its Recent Decision in *United States* v. *Reliable Transfer Co. Inc.*, 421 U.S. 397, 95 S. Ct. 1708 (1975) Does Not Require Reconsideration of the Principle of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277 (1952).

In *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277 (1952), this Court held that a Shipowner could not obtain *contribution* from the compensation paying employer of a person injured aboard ship. The purpose was to immunize such employer from any further monetary exposure beyond the payment of compensation.

However, four years later, the effect of denying any contribution to an innocent Shipowner vicariously liable under its warranty of seaworthiness for some fault of the employer led this Court to invoke an equitable implied warranty of workmanlike service from the employer, *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corporation*, 350 U.S. 124, 76 S. Ct. 232 (1956). The *Ryan* doctrine required full indemnity, rather than contribution. Obviously, the need for an equitable doctrine like *Ryan* would never have existed had the Court not earlier barred contribution in *Halcyon*. The end result is that the initial effort to limit the stevedore's exposure to compensation payments by immunizing it from contribution resulted in imposing an even greater burden upon the stevedore for indemnity under the *Ryan* doctrine.

Recently, in *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708 (1975) and in *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke Inc.*, 417 U.S. 106, 94 S. Ct. 2174 (1974), this Court recognized the equitable considerations requiring a change in the maritime law so that damages be imposed in direct proportion to fault. It would appear that the "all or nothing" approach inherent in *Halcyon* and *Ryan* is outmoded and should be replaced by the proportional fault rule articulated in *United States* v. *Reliable Transfer Co. Inc., supra*. Utilization of such a rule would suggest exoneration of the Petitioner since the Respondent's liability has already been reduced by the amount of Rodriguez' contributory negligence. In any event, for the Second Circuit to hold as a matter of law that a partly at fault Shipowner need pay no damages whatever is in direct violation of the proportional fault rule of *Reliable Transfer, supra*.

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IV.

The Issues Presented Here Are Significant, Important and Warrant Clarification.

Manifestly, the issue relating to judicial deprivation of the constitutionally guaranteed right to trial by jury, and the issue relating to a departure from the concept of a rule of law of uniform application, are issues of broad general importance to all present and prospective litigants. Judicial efforts to encroach upon the right to trial by jury must be resisted. And, it is obvious that equal justice is not to be had unless the same standards are applied to all persons similarly situated.

Some of the other issues relating to the relationship between a Shipowner and a Stevedore in a personal injury action brought by a longshoreman may have been somewhat limited, as the Court of Appeals indicates, by reason of 33 U.S.C. §905(b). However, by projection from cases pending in your deponent's office, it is estimated that there are still several thousand cases pending in this country which antedate the November 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §905(b) and which involve the issues here presented.

Furthermore, there are a growing number of cases where the issues vis-a-vis a Shipowner and a shoreside contractor are unaffected by the *Longshoremen's and Harbor Worker's Compensation Act* because the person injured aboard the vessel may not be an employee of that shoreside contractor.

We believe that the issues here presented are important to the disposition of thousands of pending cases in the maritime field, and will continue to be of importance in

that field. And, of course, in a society proud of its heritage of the "rule of law", the right to jury trial and equal application of the law is always a fundamental concern.

CONCLUSION

By reason of the foregoing it is respectfully submitted that the petition herein should be granted and a Writ of Certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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